In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act of 1988—which provides that the exclusive remedy for torts committed by federal employees acting within the scope of their employment is an action against the United States under the Federal Tort Claims Act—is inapplicable when an exception to the Federal Tort Claims Act precludes relief against the United States.

PARTIES FOR THE PROCEEDING

The petitioners are Dr. William Marshall, Jr., an Army physician, the original defendant below, and the United States of America, which was substituted as defendant by order of the district court.

The respondents, plaintiffs below, are Marcus S. Smith, Hildegard U. Smith, and Dominique Smith.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 885 F.2d 650. The opinion of the district court (Pet. App. 15a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1989. A petition for rehearing was denied on January 25, 1990 (Pet. App. 19a). The petition for a writ of certiorari was filed on April 20, 1990, and was granted on June 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988 [the Reform Act], Pub. L. No. 100-694, 102 Stat. 4563-4567, and of the Gonzalez Act, 10 U.S.C. 1089, are set forth in an appendix to the petition (Pet. App. 20a-31a). Sections 1346(b), 2671, and 2680 of Title 28 and Section 8 of the Reform Act are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. In *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988), this Court held that a federal employee enjoys absolute common-law immunity from state tort liability only if the conduct giving rise to the claim "is within the outer perimeter of [the employee's] duties and is discretionary in nature." The Court added, however, that Congress "is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context" and that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.* at 300.

Less than a year later, Congress responded with the enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567 [the Reform Act].[1] The Act's stated purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate rem-

[1] This statute is also referred to as the "Westfall Act."

edy against the United States." Section 2(b), 102 Stat. 4564; Pet. App. 21a. Congress found that *Westfall* and other decisions limiting the immunity available to federal employees had "created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce." Section 2(a)(5), 102 Stat. 4563; Pet. App. 21a. "The prospect of such liability," Congress determined, would "seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." Section 2(a)(6), 102 Stat. 4563; Pet. App. 21a.

To eliminate these conditions, the Reform Act makes "[t]he remedy against the United States provided by [the Federal Tort Claims Act] for * * * personal injury * * * resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * * exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee." 28 U.S.C. 2679(b)(1). The statute empowers the Attorney General or a court to certify that an employee named as a defendant was acting within the scope of his or her employment at the time of the events giving rise to the claim. 28 U.S.C. 2679(d)(1)-(4). If a certification is issued, then the Reform Act requires the substitution of the United States as the defendant. *Ibid.* The resulting action is "subject to the limitations and exceptions" applicable to FTCA actions commenced against the United States. 28 U.S.C. 2679(d)(4).

2. This case is a medical malpractice action commenced by respondents against petitioner William Marshall, Jr., M.D., a military physician. At the time of the events giving rise to this action, respondent Marcus Smith was a United States Army Sergeant stationed in Italy. In 1982, his wife, respondent Hildegard Smith, was admitted to the United States Army Medical Facility in Vicenza, Italy, where she gave birth to respondent Dominique Smith. Respondents' complaint alleges that Dr. Marshall's negligence during Dominique's delivery caused the child to sustain severe injuries. Pet. App. 2a; R.1. The Attorney General's designate has certified—and it is not disputed—that while Dr. Marshall treated Ms. Smith he was acting within the scope of his employment as an Army physician.

In the district court, the government filed motions seeking substitution of the United States as the defendant and dismissal of the action. The government contended that under the Gonzalez Act, 10 U.S.C. 1089 (Pet. App. 26a-29a), respondents' exclusive remedy was a suit against the United States under the Federal Tort Claims Act and that, because an exception to the Federal Tort Claims Act preserves sovereign immunity with respect to "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), respondents' suit should be dismissed. The district court granted the government's motions, substituted the United States as the defendant, and entered a final judgment dismissing the action. Pet. App. 15a-18a.

3. While respondents' appeal was pending in the court of appeals, Congress enacted the Reform Act. Because the Act was effective as to cases pending at the time of its enactment (App., *infra*, 4a), the government argued in a supplemental brief on appeal

that the Act required substitution of the United States for Dr. Marshall as the defendant. The government also sought dismissal of the action under 28 U.S.C. 2680(k)—the same disposition that the district court had ordered upon authority of the Gonzalez Act. In the supplemental brief, the government withdrew its reliance upon the Gonzalez Act.[2]

The court of appeals reversed, concluding that the Reform Act is "inapplicable to this case." Pet. App. 10a.[3] The court acknowledged that, under the Re-

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[2] The government's withdrawal of its Gonzalez Act arguments was prompted by *Newman* v. *Soballe*, 871 F.2d 969 (11th Cir. 1989), a decision issued after entry of the district court's judgment in this case. In *Newman*, the Eleventh Circuit held that the Gonzalez Act does not require substitution of the United States in place of a military physician sued for negligence committed abroad. After reviewing *Newman* and other decisions addressing this question, the Department of Justice determined that it would not continue to invoke the Gonzalez Act in cases of this kind. See Pet. 6 n.2.

[3] Although the government no longer relied on the Gonzalez Act, Dr. Marshall requested, *pro se*, that the court of appeals nevertheless consider the potential applicability of that Act. Request of William Marshall, Jr., In Propria Persona, Sept. 11, 1989). The court did so. It held that the Gonzalez Act does not require substitution of the United States in cases, such as actions arising from alleged malpractice abroad, in which 10 U.S.C. 1089(f) gives the relevant agency head the power to indemnify or provide insurance for a military physician. The court stated that the "plain meaning" of this provision "is that physicians will continue to be personally liable in the * * * situations specified." Pet. App. 5a. We have not sought further review of this ruling. (The Reform Act does not contain a comparable provision authorizing indemnification of federal employees; thus, the reasoning underlying the court's interpretation of the Gonzalez Act does not bear on the Reform Act.)

form Act, "[t]he remedy against the United States" conferred by the FTCA "is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim." *Ibid.* However, the court continued, since the "foreign country exception to the FTCA [28 U.S.C. 2680(k)] exempts the United States from liability on '[a]ny claim arising in a foreign country,'" respondents "have no remedy against the United States." Pet. App. 10a-11a. "Because they do not," the court concluded, the Reform Act "does not operate to provide Dr. Marshall with immunity." *Id.* at 11a. The court found support for this conclusion in provisions of the Act dealing with employees of the Tennessee Valley Authority and—although the court found it "somewhat contradictory"—in the Act's legislative history. *Id.* at 11a-13a.

SUMMARY OF ARGUMENT

The Reform Act unambiguously requires both substitution of the United States as the defendant in this case and dismissal of the action. The Attorney General's designate has certified—and there is no dispute—that when Dr. Marshall treated Ms. Smith he was acting within the scope of his employment as an Army physician. Under the Act, therefore, the remedy provided by the Federal Tort Claims Act is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against" Dr. Marshall; this action must now be "deemed an action against the United States"; the United States must "be substituted as the party defendant"; and the suit is "subject to the limitations and exceptions applicable to" FTCA actions commenced against the United States. 28 U.S.C. 2679

(b)(1), (d)(1) and (4). One of those "exceptions," set forth in 28 U.S.C. 2680(k), bars suit against the United States on "[a]ny claim arising in a foreign country." Because respondents' claim is within that exception, their action must be dismissed.

I. A. The court of appeals erred in concluding that the Reform Act is inapplicable because respondents "have no remedy against the United States." The Act makes "the remedy" under the FTCA—whatever relief that remedy may provide—exclusive of any action against an individual employee. 28 U.S.C. 2679(b)(1). Moreover, the Act expressly provides that actions in which the United States has been substituted "shall be subject to the * * * exceptions" applicable to actions commenced against the United States. 28 U.S.C. 2679(d)(4). The "exceptions" to which this provision refers plainly include the foreign country exception and others enumerated in Section 2680; thus, Congress could not have intended that the Reform Act would be inapplicable to actions, such as this one, encompassed by those exceptions.

Two other features of the statutory scheme buttress the conclusion that the exclusivity of the FTCA remedy is not contingent on the existence of a right to recover against the United States. First, provisions authorizing the Attorney General and the courts to certify that employees named as defendants were acting within the scope of their employment and requiring substitution of the United States in their place recognize no exception for cases in which plaintiffs are barred from recovery. 28 U.S.C. 2679(d)(1)-(3). Second, exceptions to the Reform Act preserve the possibility of a suit against a federal employee on federal constitutional and statutory causes of action (28 U.S.C. 2679(b)(2)) that are not actionable under the FTCA. Since Congress saw fit to

provide exceptions for some claims that may not be pursued under the FTCA, it must have intended to make the FTCA remedy exclusive with respect to all other claims arising out of the actions of federal employees within the scope of their employment, whether or not relief is available under that Act.

B. Contrary to respondents' contention (Br. in Opp. 20-21), 28 U.S.C. 2680—which provides that 28 U.S.C. 1346(b) and 2671-2680 "shall not apply" to specified categories of claims, one of which is foreign tort claims—does not limit the breadth of the Reform Act. Although the Reform Act is codified primarily in 28 U.S.C. 2679, it expressly makes actions within its scope "subject to the * * * exceptions" applicable to suits commenced against the United States. 28 U.S.C. 2679(d)(4). Thus, Congress must have contemplated that the Reform Act would govern actions within the exceptions enumerated in Section 2680. Moreover, in making the FTCA the exclusive remedy for tort claims against federal employees, including those claims within FTCA exceptions, the Reform Act follows the settled interpretation of two predecessor provisions. Those provisions, which have also been codified in 28 U.S.C. 2679, have made the FTCA the exclusive remedy for claims against "sue and be sued" federal agencies and against federal employees involved in motor vehicle accidents. By the time Congress enacted the Reform Act, these provisions had repeatedly been held to apply to claims on which suit against the United States was barred by FTCA exceptions or other similar provisions. As Section 2679(d)(4) reflects, Congress anticipated that the Reform Act would receive a parallel construction.

C. The legislative history of the Reform Act addresses the precise point at issue. The House committee report states that "any claim against the government that is precluded by the exceptions set forth in Section 2680 * * * also is precluded against an employee [or] his or her estate." H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988). That is this case.

D. The court of appeals' interpretation of the Reform Act would undercut the Act's express objective and perpetuate the conditions it was designed to eliminate. The Act's declared purpose and legislative findings establish that Congress viewed with alarm the prospect of actions against individual employees and meant to restore broad immunity to the federal workforce. In this light, the Reform Act cannot fairly be construed to permit the many actions against individuals contemplated by the court of appeals' interpretation.

II.A. The Gonzalez Act does not entitle respondents to pursue an action against Dr. Marshall that is prohibited by the Reform Act. The Reform Act includes two express exceptions, which permit an action against a federal employee only when the action is (1) "brought for a violation of the Constitution" or (2) "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2). Respondents' action against Dr. Marshall does not qualify for either exception. The first exception—for *Bivens* actions—is entirely inapposite. And as to the second exception, respondents cannot base their claim against Dr. Marshall on a "violation of a statute of the United States." Although the Gonzalez Act authorizes indemnification of military physicians for some claims, it does not establish any duty that a military physician can violate.

B. Respondents have also argued (Br. in Opp. 8-17) that application of the Reform Act to cases like this one would represent an unwarranted implied repeal of the Gonzalez Act. In their view, because the Gonzalez Act authorizes indemnification of military physicians sued for malpractice abroad, those physicians should not be able to invoke the Reform Act.

Respondents' reliance on the presumption against implied repeals is misplaced, for two reasons. First, affording Dr. Marshall the protection that he is due under the Reform Act would in no sense "repeal" the Gonzalez Act. The Gonzalez Act does not create any right of action against a military physician; to the contrary, it *withdraws* the right to pursue most such actions and authorizes insurance or indemnity as to the remainder. Applying the Reform Act to those cases in the second category that fall within that statute's scope does not repeal or otherwise undercut the Gonzalez Act. Second, even if the presumption against implied repeal were applicable, it would not justify withholding from Dr. Marshall the protection to which he is entitled under the Reform Act. That Act applies to "any employee of the Government," a statutorily defined term that unquestionably encompasses all members of the military. 28 U.S.C. 2671, 2679(b)(1). Moreover, one of the Act's express exceptions preserves a limited category of federal statutory claims—those based on a "violation" of a statutory duty. Necessarily, the exception forecloses recognition of an additional, unstated exception for other claims related in some different sense to a federal statute. Finally, the legislative history reflects that Congress intended the Reform Act to apply to cases like this one.

ARGUMENT

I. UNDER THE REFORM ACT, THE EXCLUSIVE REMEDY FOR ALL CLAIMS ARISING FROM TORTS COMMITTED BY FEDERAL EMPLOYEES ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT, EXCEPT FOR CLAIMS ARISING FROM VIOLATIONS OF THE CONSTITUTION OR A FEDERAL STATUTE, IS A SUIT AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

Congress enacted the Reform Act in 1988 to remedy "the threat of protracted personal tort litigation for the entire federal workforce." Section 2(a)(5), 102 Stat. 4563; Pet. App. 21a. To effectuate that purpose, the statute makes the FTCA the exclusive judicial remedy—excepting only two categories of federal constitutional and statutory actions—for claims for money damages resulting from torts committed by federal employees acting within the scope of their employment. As amended by the Reform Act, 28 U.S.C. 2679(b)(1) declares:

> The remedy against the United States provided by [28 U.S.C. 1346(b) and 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

Only two categories of civil actions against individual federal employees are permitted: (1) actions "brought for a violation of the Constitution of the United States" and (2) actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2).

To enforce the exclusivity of the FTCA remedy and resolve disputes over whether a federal employee was acting within the scope of his employment, the Reform Act provides for what have come to be known as "scope certifications." The Act empowers the Attorney General, in an action commenced against a federal employee, to certify that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1)-(2).[4] In the event the Attorney General refuses to issue a scope certification, the employee may seek one from the court. 28 U.S.C. 2679(d)(3). Upon issuance of a scope certification by the Attorney General or a court, an action commenced against a federal employee "shall be deemed an action against the United States"

[4] The Attorney General has delegated his authority to issue scope certifications to the United States Attorneys, subject to the oversight of the Assistant Attorney General of the Civil Division of the Department of Justice. 28 C.F.R. 15.3. The Assistant Attorney General's authority with respect to scope certifications has in turn been delegated to, among others, the Director of the Torts Branch. 28 C.F.R. 15.3 App. This official issued the scope certification in this case.

Although the Attorney General's scope certifications are conclusive "for purposes of removal," they are subject to judicial review for purposes of determining whether an action ultimately proceeds against an employee or the United States. *Nasuti* v. *Scannell*, No. 89-1830 (1st Cir. June 29, 1990); *Arbour* v. *Jenkins*, 903 F.2d 416 (6th Cir. 1990).

under Title 28, "and the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1)-(3). The action then "proceed[s] in the same manner as any action against the United States filed pursuant to section 1346(b) of [Title 28] and [is] subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4).

In view of the certification that Dr. Marshall was acting within the scope of his employment in treating Ms. Smith, the Reform Act unambiguously limits respondents to an action against the United States under the FTCA and requires substitution of the United States as the defendant in Dr. Marshall's place. Further, because suit against the United States is barred by the foreign country exception to the FTCA, 28 U.S.C. 2680(k), the action should be dismissed.[5]

A. Under the Reform Act, the Exclusivity of the FTCA Remedy is not Dependent Upon the Existence of a Right to Recover Against the United States

1. Section 2679(b)(1) states that "[t]he remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

[5] In cases like this one, an administrative remedy is potentially available under the Military Claims Act, 10 U.S.C. 2733 *et seq.* See generally 1 L. Jayson, *Handling Federal Tort Claims* § 4.02 (1990). We are advised that respondents filed a claim under this statute and that their claim remains pending, but that there is a substantial question as to whether respondents complied with the relevant two-year statute of limitations. If relief is unavailable under the FTCA and the Military Claims Act, there remains the possibility of a private bill. See *OPM* v. *Richmond*, 110 S. Ct. 2465, 2475 (1990).

office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee * * * or against the estate of such employee." This provision is an unconditional declaration that actions against individual federal employees are precluded. The phrase on which the court of appeals relied—"[t]he remedy against the United States provided by" the FTCA—does not make the exclusivity of the FTCA contingent upon the availability of relief. It is not the equivalent of "if a remedy is available against the United States under" the cited provisions. Rather, "the remedy" is a shorthand reference to the authority possessed by courts and administrative agencies to provide relief for injuries caused by federal employees; as such, "the remedy" takes that authority (and accompanying limitations) as it finds them. "[T]he mandate in * * * the [Reform] Act is clear. An action against a federal employee who has been certified as acting in the scope of her employment must proceed *exclusively* against the United States under the FTCA." *Mitchell* v. *Carlson*, 896 F.2d 128, 134 (5th Cir. 1990).

2. Sections 2679(d)(4) and 2674 confirm that the exclusivity of the FTCA remedy and the substitution of the United States are not affected by the existence of legal defenses that may defeat an individual plaintiff's claim. Under Section 2679(d)(4), an individual action in which a scope certification has been issued "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of [Title 28] and shall be subject to the limitations and exceptions applicable to those actions." Similarly, the government may invoke, in addition to judicial or legislative immunity available to the individual employee involved, "any other defenses to which the United States is entitled." 28 U.S.C. 2674. These provisions unambiguously require an action in which the United States has been substituted to be treated in the same manner—subject to the same "limitations," "exceptions," and "defenses"—as an action commenced against the United States. *Mitchell* v. *Carlson*, 896 F.2d at 134-35; *Gogek* v. *Brown Univ.*, 729 F. Supp. 926, 931-932 (D.R.I. 1990). The "exceptions" to which Section 2679(d)(4) refers plainly include those enumerated under the title "Exceptions" in Section 2680. Necessarily, therefore, the actions for which the FTCA is the exclusive remedy—and in which the United States must be substituted as the defendant—include actions within these FTCA exceptions. *Aviles* v. *Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989). There would have been no sense in specifying that actions in which the United States has been substituted under the Reform Act would be "subject to" Section 2680's exceptions if the Act could never apply to those cases in the first place.

3. The procedural provisions of the Reform Act buttress the conclusion that the exclusivity of the FTCA remedy is not dependent on the existence of a right of recovery against the United States in a particular case. The issuance of a scope certification by the Attorney General is contingent only upon a determination that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1)-(2). Further, upon such a certification, "*any* civil action or proceeding commenced upon such claim" shall be deemed an action against the United States, which must be substituted as the defendant. *Ibid.* (emphasis added). The statute does

not suggest that a scope certification may be withheld—or substitution denied—based on a determination that the plaintiff is barred from recovering against the United States.[6]

The exceptions to the Reform Act also demonstrate that the exclusivity of the FTCA remedy is not limited to rights of action on which the FTCA permits recovery. Section 2679(b)(2) preserves the possibility of an individual action for two categories of claims: those "brought for a violation of the Constitution of the United States" and those "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." Significantly, however, "a claim based wholly on violation of the Constitution or of federal statutes is not actionable under the FTCA." 2 L. Jayson, *Handling Federal Tort Claims* § 218.01, at 9-214 & n.2.1a (1990 ed.).[7] The fact that Congress saw fit to provide exceptions in the Reform Act for two categories of claims falling outside the scope of the FTCA suggests that Congress understood that those claims would otherwise be barred. If that is so, it could not have intended that the applicability of Section 2679(b)(1) would depend on the availability of a cause of action against the United States under the FTCA.

4. When it construed the Reform Act, the court of appeals focused exclusively on the first sentence of Section 2679(b)(1). Pet. App. 10a-11a. However, the interpretation of that Act should not be "guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." *Richards* v. *United States*, 369 U.S. 1, 11 (1962). All of the elements of the Reform Act—the provision making the FTCA remedy exclusive of any action for damages against an individual employee, the exceptions to that provision, the procedures through which the guarantee of exclusivity is implemented, and the provisions reserving limitations, exceptions, and defenses to the government—require the conclusion that, with only

[6] The statute contains no provision permitting the resubstitution of the employee in place of the United States in a case in which recovery against the United States is barred. By contrast, the Gonzalez Act, 10 U.S.C. 1089(c), and other similar statutes have provided, with respect to suits initiated against individual federal employees but removed to federal court upon substitution of the United States:

> Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

This language was not incorporated in the Reform Act. See *Nasuti* v. *Scannell*, slip op. 20 ("[S]o long as the Attorney General's certificate is validly in effect, [an employee against whom suit has been brought] must be deemed conclusively, for removal purposes, to have been acting within the scope of his employment, *and is thus absolutely immune from any civil action or proceeding for money damages.*").

[7] The FTCA waives sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with *the law of the place where the act or omission occurred.*" 28 U.S.C. 1346(b) (emphasis added); accord 28 U.S.C. 2674 (providing that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances"). In virtually all cases, the effect of these provisions is to require resort to state law. See *Richards* v. *United States*, 369 U.S. 1 (1962). Purely federal statutory or constitutional causes of action are outside the scope of the FTCA's waiver of sovereign immunity.

two express exceptions, the Act bars *all* claims against individual employees.

The court of appeals' interpretation has been rejected by virtually every other court to have considered it. Decisions in three circuits have expressly determined that the Reform Act bars actions against federal employees on claims within exceptions to the FTCA.[8] Several courts of appeals have also held that the Reform Act forecloses actions brought by federal employees against co-employees—even though the Federal Employees' Compensation Act, 5 U.S.C. 8116(c), bars relief under the FTCA in that situation.[9] As these decisions reflect, the Act provides no support for the Ninth Circuit's ruling that the Reform Act permits an action against an employee when the plaintiff has no right to recover under the FTCA.[10]

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[8] *Mitchell* v. *Carlson*, 896 F.2d 128 (5th Cir. 1990) (assault claim); *Aviles* v. *Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (alleged libel and interference with contractual relations); *Nasuti* v. *Scannell*, slip op. 20-22 & n.14, 27, 32 (assault claim). But see *Newman* v. *Soballe*, 871 F.2d 969, 971 (11th Cir. 1989). Three other courts of appeals have applied the Reform Act to cases in which FTCA exceptions bar suit against the United States, albeit without discussing the question whether the Act mandates that result. See *Jordan* v. *Hudson*, 879 F.2d 98 (4th Cir. 1989); *Moreno* v. *Small Business Adm.*, 877 F.2d 715 (8th Cir. 1989); *Yalkut* v. *Gemignani*, 873 F.2d 31, 34 (2d Cir. 1989). See also *Springer* v. *Bryant*, 897 F.2d 1085 (11th Cir. 1990) (prohibiting individual action on claim that could not be pursued against TVA).

[9] See *Sowell* v. *American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Lunsford* v. *Price*, 885 F.2d 236, 237-239 (5th Cir. 1989) (suit against TVA employees).

[10] The court of appeals suggested that Section 9 of the Reform Act, 102 Stat. 4566 (Pet. App. 25a-26a), which deals with suits against TVA employees, supports its interpretation

B. Section 2680 Does Not Limit the Scope of the Reform Act

Section 2680 states that the provisions of Chapter 171 of Title 28 and 28 U.S.C. 1346(b) "shall not apply to" various categories of claims. This Section was intended to itemize claims as to which the United States would retain its sovereign immunity. Respondents contend, however, that it also operates to exempt the enumerated categories of claims from the Reform Act. See *Newman* v. *Soballe*, 871 F.2d 969, 971 (11th Cir. 1989). This contention contradicts the Reform Act's text and the settled interpretation of the FTCA on which Congress relied when it enacted the Reform Act.

1. As noted, Section 2679(d)(4) provides that actions in which the United States has been substituted as the defendant following a scope determination "shall be subject to the limitations and *exceptions*" applicable to actions filed under Section 1346(b). 28 U.S.C. 2679(d)(4) (emphasis added). Thus, Congress must have contemplated that the actions in which the Reform Act would require substitution of the United States—and that could not be pursued against federal employees—would include those subject to the exceptions enumerated in Section 2680.

2. In this respect, Section 2679(d)(4) merely carries forward the structure that the courts have re-

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of the statute. Pet. App. 11a. However, as its text reflects and its sponsor made clear, Section 9 "merely provides that the same protections enjoyed by Federal employees should be enjoyed by TVA employees." 134 Cong. Rec. S15599 (daily ed. Oct. 12, 1988) (remarks of Sen. Heflin). See *Lunsford* v. *Price*, 885 F.2d 236 (5th Cir. 1989); *Springer* v. *Bryant*, 897 F.2d 1085 (11th Cir. 1990). The Fifth Circuit has rejected the inference that the Ninth Circuit drew from Section 9. *Mitchell* v. *Carlson*, 896 F.2d at 135 n.7.

peatedly found to exist in the Federal Tort Claims Act. Before the passage of the Reform Act, Section 2679 included provisions making the FTCA remedy exclusive of actions against federal agencies and actions against federal employees who were involved in automobile accidents while acting within the scope of their employment. The courts had consistently construed these provisions to apply to claims subject to Section 2680's exceptions or equivalent bars to recovery against the United States.

a. From its inception, the Federal Tort Claims Act has provided that "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." 28 U.S.C. 2679(a). By 1988, the courts of appeals had uniformly rejected the equivalent of respondents' contention here: that Section 2680 makes Section 2679(a) inapplicable to claims within FTCA exceptions.[11]

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[11] *E.g.*, *Taylor* v. *Administrator of the Small Business Admin.*, 722 F.2d 105 (5th Cir. 1983); *Northridge Bank* v. *Community Eye Care Center, Inc.*, 655 F.2d 832, 834-835 (7th Cir. 1981); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, 506 F.2d 1213 (9th Cir. 1974); *Edelman* v. *Federal Housing Admin.*, 382 F.2d 594 (2d Cir. 1967); *Goddard* v. *District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345-346 & n.3 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *Freeling* v. *FDIC*, 221 F. Supp. 955 (W.D. Okla. 1962), aff'd per curiam, 326 F.2d 971 (10th Cir. 1963). See also *Peak* v. *Small Business Admin.*, 660 F.2d 375, 377-378 (8th Cir. 1981).

Prior to the enactment of the FTCA, "sue and be sued" agencies were subject to suit on torts committed by their employees within the scope of their employment. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939). Thus, as to these agencies, the effect of the courts of appeals' rulings was to confer immunity from claims that could have been pursued prior to the FTCA's enactment.

In *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, 506 F.2d 1213 (9th Cir. 1974), for instance, the plaintiff filed suit against the FDIC in its own name. The complaint alleged that the FDIC had participated in a scheme to defraud purchasers of certificates of deposit brokered by a bankrupt bank. The agency contended that the suit was barred by 28 U.S.C. 2680(h) (the FTCA exception for misrepresentation, fraud, and deceit claims), and the plaintiff responded that—because Section 2680 provides that the FTCA "shall not apply" to claims of that type—such claims were not "'cognizable' [under 28 U.S.C. 1346(b)] within the meaning of 28 U.S.C. 2679(a)" and thus "the 'sue or be sued' authority of the FDIC is not altered by the FTCA." 506 F.2d at 1215. The court of appeals rejected the plaintiff's argument, explaining (*id.* at 1215-1216):

> The purpose in making the FTCA an exclusive remedy was to permit suit against the United States on certain claims and to prevent suit on those claims, such as misrepresentation and deceit, which were excluded.

Congress took note of the decisions applying Section 2679(a) to torts falling within Section 2680's exceptions when it enacted the Reform Act. The House committee report cited two of those cases in support of the proposition that the Reform Act would

apply to claims within FTCA exceptions.[12] The expectation reflected in the committee report—that the Reform Act would be interpreted in the same manner as an earlier provision occupying an analogous place in the statutory scheme—was entirely reasonable. In view of the many decisions holding that Section 2679(a) protects sue and be sued agencies from actions on claims within FTCA exceptions, Congress could not have supposed that Section 2679(b), as amended by the Reform Act, would fail to protect federal employees—including employees of the very same agencies—from suit on the same claims.

b. When it enacted the Reform Act, Congress also relied on decisions construing the Federal Drivers Act, the statute that was codified in subsections (b) through (e) of Section 2679 before it was displaced by the Reform Act. See 28 U.S.C. 2679(b)-(e) (1982). The Drivers Act made the FTCA the exclusive remedy for "injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. 2679(b) (1982). As in the decisions construing 28 U.S.C. 2679(a), the courts of appeals consistently held that the Drivers Act barred suit against individual drivers even on claims that could not be pursued against the United States under the FTCA.[13] The House committee report on

[12] See H.R. Rep. No. 700, *supra*, at 6-7 (citing *Safeway Portland* and *Edelman* v. *Federal Housing Admin.*, 382 F.2d 594 (2d Cir. 1967)).

[13] *Thomason* v. *Sanchez*, 539 F.2d 955 (3d Cir. 1976) (suit against U.S. barred by *Feres* doctrine), cert. denied, 429 U.S. 1072 (1977); *Carr* v. *United States*, 422 F.2d 1007 (4th Cir. 1970) (suit against U.S. barred by FECA statute); *Van Houten* v. *Ralls*, 411 F.2d 940 (9th Cir.), cert. denied, 396 U.S. 962 (1969) (same); *Noga* v. *United States*, 411 F.2d 943 (9th Cir.), cert. denied, 396 U.S. 841 (1969) (same); *Gilliam* v. *United States*, 407 F.2d 818 (6th Cir. 1969) (same); *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968) (same). See *Nasuti* v. *Scannell*, 792 F.2d 264, 266 (1st Cir. 1986) (reserving question whether Federal Drivers Act applied to intentional tort suit). See also 42 U.S.C. 2212 (statute making FTCA remedy exclusive of actions against contractors involved in nuclear weapons testing programs); *In re Consolidated United States Atmospheric Testing Litig.*, 616 F. Supp. 759, 765-766 (N.D. Cal. 1985) (holding statute applicable to claims barred by discretionary function exception and *Feres* doctrine), aff'd, 820 F.2d 982 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988).

the Reform Act reflected Congress's reliance on these precedents, citing one of them for the proposition that the Act would protect federal employees even against claims that, because of the applicability of an FTCA exception, could not be pursued against the United States.[14]

[14] H.R. Rep. No. 700, *supra* at 6-7 (citing *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968)).

In many respects, the Reform Act also followed the form of statutes making the FTCA the exclusive remedy for malpractice claims against medical personnel employed by the military, 10 U.S.C. 1089; the State Department, 22 U.S.C. 2702; the Veterans Administration, 38 U.S.C. 4116; NASA, 42 U.S.C. 2458a; and the Public Health Service, 42 U.S.C. 233. See also 10 U.S.C. 1054 (legal malpractice claims against Department of Defense personnel). At the time of Congress's action on the Reform Act, the courts were divided on the issue whether these statutes precluded actions against federal employees on claims falling within exceptions to the FTCA. Compare *Lojuk* v. *Quandt*, 706 F.2d 1456, 1462 (1983), after remand, 770 F.2d 619, 622-625 (7th Cir. 1985), cert. denied, 474 U.S. 1067 (1986) (38 U.S.C. 4116 does not make FTCA exclusive remedy for intentional tort claim that would be

In view of the decisions that had construed provisions in Section 2679 prior to 1988, Congress could not have intended (or foreseen) that placing the principal provisions of the Reform Act in that Section would render them inapplicable to the categories of claims enumerated in Section 2680. In fact, when Congress provided that actions in which the United States had been substituted under the Reform Act would "be subject to [those] exceptions" (28 U.S.C. 2679(d)(4)), it made explicit the relationship between Sections 2679 and 2680 that the courts had already repeatedly found to exist.

C. The Legislative History of the Reform Act Confirms that Congress Intended to Confer Immunity on Federal Employees from the Claims Enumerated in Section 2680

The Reform Act's legislative history confirms that Congress intended the FTCA remedy to be exclusive even with respect to claims within FTCA exceptions. The House committee report could not be clearer (H.R. Rep. No. 700, *supra*, at 6-7 (emphasis added)):

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. *Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate.* See *Edelman* v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Safeway Portland E.F.C.U.* v. *Federal Deposit Insurance Corporation*, 506 F.2d 1213 (9th Cir. 1974); *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968); *Powers* v. *Schultz* 821 F.2d 295 (5th Cir. 1987).[18]

As the Fifth Circuit noted, the snippets of legislative history on which the Ninth Circuit relied in this case (see Pet. App. 12a-13a) do not support a different conclusion. *Mitchell* v. *Carlson*, 896 F.2d at 136 ("Isolated language found scattered throughout the legislative history is insufficient persuasion that Congress intended to frustrate the very purpose of the [Reform] Act."). The statement in the House committee report that "no one who previously had the right to initiate a lawsuit will lose that right" (H.R. Rep. No. 700, *supra*, at 7) was addressed to the transitional provisions of the Act. Because the Reform Act was immediately effective, Congress took

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barred by Section 2680(h)); *Anderson* v. *O'Donoghue*, 677 P.2d 648, 650-652 (Okla. 1983) (same result under 10 U.S.C. 1089), with *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987) (10 U.S.C. 1089 bars suit against military physician on claim subject to FTCA's foreign tort exception). Whatever the merits of these decisions, the legislative history reflects that Congress intended the Reform Act to follow the decision in *Powers* v. *Schultz*. H.R. Rep. No. 700, *supra*, at 6 (citing *Powers* as an indicator of the drafters' intent). See *Sullivan* v. *Finkelstein*, No. 89-504 (June 18, 1990) (Scalia, J., concurring) ("In some situations, of course, the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration.").

[18] This House Report was the only committee report accompanying the Act. *Cf. Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (committee reports are most authoritative form of legislative history). The Act was discussed only briefly on the floor of each House. See 134 Cong. Rec. 15,962-15,963 (1988); *id.* at 16,243; 134 Cong. Rec. S15,597-S15,600 (daily ed. Oct. 12, 1988); *id.* at H10,677-H10,678 (daily ed. Oct. 20, 1988).

care to assure that FTCA procedural requirements would not operate to deprive persons whose claims had accrued before the enactment of the Reform Act of the opportunity to pursue them. See Section 8(c)-(d) of the Reform Act, 102 Stat. 4566; App., *infra*, 4a-5a. The committee report expressed the intention to preserve these plaintiffs' opportunity to initiate their suits against the United States under the FTCA, but did not suggest that they would be allowed to commence suits against individual employees.

In relying on statements by members of Congress to the effect that the Act was intended to preserve plaintiffs' preexisting legal remedies, the court of appeals also failed to recognize the regime that the legislation's supporters believed had prevailed prior to *Westfall* v. *Erwin*, *supra*. All of the Congressmen who spoke or offered written submissions in support of the legislation took the position that, before *Westfall*, federal employees had been absolutely immune from liability for state-law torts committed while they were acting within the scope of their employment. *E.g.*, 134 Cong. Rec. 15,963 (1988) (remarks of Reps. Frank, Moorhead, and Wolf); 134 Cong. Rec. S15,599-S15,600 (daily ed. Oct. 12, 1988) (remarks of Sens. Heflin and Grassley). See H.R. Rep. No. 700, *supra*, at 2. This was the status quo ante that the legislation was designed to restore—and the frame of reference for assertions that the Act would not deprive plaintiffs of preexisting remedies.[18]

[18] Representative Wolf's written submission, from which the court of appeals quoted (Pet. App. 12a), is typical of the views expressed by the legislation's spokesmen on the floor of both Houses. Before addressing the legislation's effect on preexisting remedies, Rep. Wolf observed that "[p]rior to Westfall, civil servants could operate under the assumption that they were absolutely immune from State common law tort liability." 134 Cong. Rec. 15,963 (1988). Against that background, he explained the intent of the Reform Act as follows (*ibid.* (emphasis added to material quoted by the court of appeals)):

> To return protection to Government workers, H.R. 4612, amends the Federal Torts Claims Act to operate in the way that it effectively has been operating for three decades—as an exclusive remedy. *In no way does this measure infringe or diminish any legal rights of the individual.* Under the legislation, the United States is substituted as the sole defendant in cases alleging that a Federal employee committed a common law tort within the scope of his office or employment. Since the remedy against the Government would be exclusive, no other action or civil suit could be lodged against the employee or his estate, as is the current situation under Westfall.

In short, Representative Wolf recognized that—by contrast to "the current situation under Westfall"—the legislation would not permit an action or civil suit against an employee or his estate. See also *Legislation to Amend the Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 33-38 (1988) (testimony of Rep. Wolf).

No member of Congress suggested that the legislation would preserve the possibility of an individual action against a federal employee for claims that could not be pursued against the United States.

D. The Court of Appeals' Interpretation of the Reform Act Would Violate the Statute's Express Purpose and Preserve the Very Threat of Individual Liability that the Act Was Designed to Eliminate

The findings and declaration of purpose enacted as part of the Reform Act "make clear that Congress's chief aim was to restore and protect federal employees' immunity." *Nasuti* v. *Scannell*, slip op. 16. The

operative provisions of the Act cannot reasonably be construed to preserve the threat of individual litigation that the Act was designed to eliminate.

As we have noted, the Reform Act was prompted by Congress's alarm over the implications of this Court's decision in *Westfall* v. *Erwin*, *supra*. *Westfall* and other decisions, Congress found, had "seriously eroded the common law tort immunity previously available to Federal employees," thereby "creat[ing] an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce." Section 2(a)(4) and (5), 102 Stat. 4563; Pet. App. 20a-21a. Congress also found that this threat of liability would "seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." Section 2(a)(6), 102 Stat. 4563; Pet. App. 21a. The Act's declared purpose was to eliminate those conditions—*i.e.*, "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Section 2(b), 102 Stat. 4564; Pet. App. 21a.

A Congress that viewed the prospect of personal liability as "an immediate crisis" and saw expanded immunity as the solution would surely not have left gaps in that immunity as broad as those inherent in the court of appeals' interpretation of the Act. Section 2680 sets forth numerous exceptions to FTCA liability. For example, 28 U.S.C. 2680(b) and (c)

preclude government liability for claims arising out of the miscarriage of mail, the collection of taxes, or the detention of goods in custody. Under the court of appeals' analysis, individual postal or customs workers would be exposed to the threat of suits in their individual capacity for such matters, based on simple negligence. Similarly, federal employees would be subject to personal suit on claims of the types enumerated in 28 U.S.C. 2680(h), including misrepresentation, defamation, or interference with contract rights.[17] Congress's objective of "protect[ing] Federal employees from personal liability for common law torts committed within the scope of their employment" (Pet. App. 21a) supports the conclusion that an action against the United States was intended as the exclusive remedy for all such torts.[18]

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[17] Indeed, under respondents' analysis, there would be no substitution of the United States in a case such as *Barr* v. *Matteo*, 360 U.S. 564 (1959). It is most unlikely that a Congress concerned with the implications of the *Westfall* decision would have failed to provide protection for cases of that type.

[18] See *Lunsford* v. *Price*, 885 F.2d 236, 237 n.5 (5th Cir. 1989) ("The law, in essence, overrules the distinction *Westfall* drew between 'operational' and 'discretionary' capacities, and creates absolute tort immunity for acts of Federal employees within the course and scope of their employment."); *Springer* v. *Bryant*, 897 F.2d 1085, 1086 (11th Cir. 1990) (purpose of the Reform Act was "to create absolute immunity for federal employees who, within the scope of their employment, commit common law torts"). As the House committee report explained (H.R. Rep. No. 700, *supra*, at 4):

> H.R. 4612 would remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment and would instead provide that the exclusive remedy for such torts is

That the purpose of the Reform Act also includes "providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States" (Section 2(b), 102 Stat. 4564; Pet. App. 21a) does not suggest otherwise. Compare Pet. App. 12a. As shown by the findings included in the Act, Congress conceived of the Federal Tort Claims Act—with all of its exceptions—as the only "appropriate" remedy for torts committed by federal employees within the scope of their employment. Congress found that "[f]or more than 40 years the Federal Tort Claims Act ha[d] been *the legal mechanism* for compensating persons injured by the negligent or wrongful acts of Federal employees committed within the scope of their employment." Section 2(a)(1), 102 Stat. 4563; Pet. App. 20a (emphasis added). Indeed, Congress declared that the FTCA had been "the sole means" of providing relief. Section 2(a)(3), 102 Stat. 4563; Pet. App. 20a. When Congress spoke of "an appropriate remedy," it was plainly referring to this *exclusive* remedy and not the amalgam of actions contemplated by the court of appeals' interpretation—*i.e.*, actions against the United States on claims as to which it has waived sovereign immunity plus actions against individuals on other claims to the extent they are not barred by the defendants' *Westfall* immunity.

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through an action against the United States under the Federal Tort Claims Act.

Accord *id.* at 2, 5.

II. THE GONZALEZ ACT DOES NOT FORECLOSE THE APPLICATION OF THE REFORM ACT TO THIS CASE

In the court of appeals and in their brief in opposition, respondents have argued that the Gonzalez Act, 10 U.S.C. 1089, furnishes the basis for an action against Dr. Marshall. As we understand their position, respondents offer two alternative grounds for this conclusion. First, respondents maintain that the Gonzalez Act recognizes a cause of action against a military physician that is preserved by an express exception to the Reform Act—*i.e.*, that their action has been "brought for a violation of" the Gonzalez Act "under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2)(B). Second, respondents argue that applying the Reform Act to this case would represent an unwarranted implied repeal of the Gonzalez Act. See Br. in Opp. 8-14. Because the court of appeals held that the Reform Act was inapplicable by its own terms to cases in which the foreign tort exception bars a suit against the United States, it did not address either of these grounds. Thus, if the Court agrees with our analysis in Part I, it may wish to remand the case to the court of appeals for its consideration of this issue. But we believe that the issue is ripe for this Court's decision now, and that both grounds advanced by respondents are without merit.

A. Respondents' Action Against Dr. Marshall is Not "Brought for a Violation of" the Gonzalez Act

The Reform Act, in Section 2679(b)(2)(B), permits an action against a federal employee "brought for a violation of a statute of the United States under which such action against an individual is otherwise

authorized." Respondents' action against Dr. Marshall does not qualify for this exception.

The Gonzalez Act has three principal aspects: it provides two forms of protection to military medical personnel who are sued for malpractice committed while they were acting within the scope of their employment and also narrows an FTCA exception as applied to military malpractice claims. First, with respect to employees within its scope, the Act makes the FTCA remedy exclusive and provides procedures comparable in many respects to those of the Reform Act for substituting the United States in place of individuals named as defendants. 10 U.S.C. 1089 (a)-(d).[19] Second, the Gonzalez Act authorizes (but does not require) agency heads to provide insurance or indemnity in cases in which the relevant medical employee "is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury." 10 U.S.C. 1089(f). Third, in providing that the FTCA exception for intentional torts does not apply to medical malpractice claims, the Act has the effect of permitting FTCA actions against the United States based upon allegations that a doctor has performed

[19] Under the court of appeals' interpretation of the Act (which the government no longer challenges, see notes 2-3, *supra*), this form of protection is available only in actions that are not barred by an FTCA exception. The basis for that interpretation is the provision—which has no counterpart in the Reform Act—authorizing insurance or indemnification of military medical personnel. See Pet. App. 4a-6a (relying on 10 U.S.C. 1089(f) in construing exclusive remedy provision of Gonzalez Act).

medical procedures to which the plaintiff did not consent. 10 U.S.C. 1089(e).

Significantly, the Gonzalez Act imposes no legal duty of any kind on anyone. Thus, a military physician cannot "violate" the Act, and there is no such thing as a civil action "brought for a violation of" the Gonzalez Act. 28 U.S.C. 2679(b)(2)(B). Whatever claim a plaintiff may have against a military physician is based exclusively on some other source of law—usually state tort law. In fact, the Gonzalez Act *withdraws* the right to pursue most such claims against individual physicians, and is neutral as to the remainder. Actions against military physicians are thus not among the federal statutory actions preserved by an express exception to the Reform Act.

B. The Gonzalez Act Does Not Otherwise Limit the Scope of the Reform Act

Contrary to respondents' contention, applying the Reform Act to this case would not violate the presumption against implied repeals of statutes.[20] In the first place, affording military physicians the protection of the Reform Act would not constitute a "repeal" of the Gonzalez Act. As we have shown, the latter statute does not provide potential plaintiffs with any affirmative right to pursue an action against a military physician. Its function is not to confer rights on plaintiffs, but "to provide, through application of the Federal Tort Claims Act, protection from individual liability to certain medical personnel while acting within the scope of their official duties," to immunize those personnel from malpractice suits, and to "eliminate the need of malpractice insurance for all such medical personnel." S. Rep. No. 1264,

[20] See generally 1A N. Singer, *Sutherland Statutory Construction* § 23.10 (4th ed. 1985).

94th Cong., 2d Sess. 1 (1976). Application of the Reform Act may render Gonzalez Act insurance or indemnification unnecessary in some cases in which it might otherwise have been appropriate, but that consequence does not entail any withdrawal of Congress's grant of protection to military physicians. Thus, the Reform Act does not repeal or supersede the Gonzalez Act; it provides *additional* protection for some employees within the scope of the earlier Act.

Indeed, indemnification authorized by the Gonzalez Act would continue to be needed in some cases—*i.e.*, actions that foreign courts may permit against individual physicians, see *Powers* v. *Schultz*, 821 F.2d at 297-298. And the Reform Act also has no effect on the Gonzalez Act's waiver of sovereign immunity as to malpractice claims sounding in intentional tort. Thus even after the Reform Act, the Gonzalez Act (and other statutes containing similar provisions, see note 14, *supra*) will serve an important function: authorizing the pursuit of "intentional" malpractice claims against the United States under the FTCA. An express "repeal" of the Gonzalez Act and other statutes would have constituted unwarranted overkill by the drafters of the Reform Act.

Even if the presumption against implied repeal were applicable, it would not justify denying military physicians the protection of the Reform Act in cases like this one. The Reform Act makes the FTCA the exclusive remedy for personal injury "resulting from the negligent or wrongful act or omission of *any employee of the Government*." 28 U.S.C. 2679(b)(1) (emphasis added). Within the framework of the FTCA, the term "employee of the government" is a defined term; it specifically "includes * * * members of the military or naval forces of

the United States." 28 U.S.C. 2671. By its terms, therefore, the Reform Act extends its protection to any member of the military or naval forces of the United States, a class that plainly includes Dr. Marshall and other military medical personnel. This language leaves no leeway for an unstated exception to the Reform Act for those individuals.

Similarly, the all-embracing language of the Reform Act precludes unstated exceptions for particular types of claims. The FTCA remedy is made exclusive of "any other civil action or proceeding for money damages" by reason of a tort committed by a federal employee acting within the scope of his employment, 28 U.S.C. 2679(b)(1); the Attorney General is authorized to issue a scope certification in "any civil action or proceeding" commenced in state or federal court on such a claim, 28 U.S.C. 2679(d)(1)-(2); upon the issuance of a scope certification, "any action or proceeding" in which it was issued must proceed in the same manner as any action against the United States subject to the limitations and exceptions applicable to those actions, 28 U.S.C. 2679(d)(4); and the Act applies "to all claims, civil actions, and proceedings pending on, or filed on or after," its date of enactment, Section 8(b), 102 Stat. 4565-4566; Pet. App. 25a.

Moreover, the narrowly-tailored, express exceptions in 28 U.S.C. 2679(b)(2) for causes of action based upon violations of the Constitution or a federal statute foreclose recognition of an implied exception for other claims. See *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Congress has made a statutory ac-

tion against a federal employee contingent upon a "violation" of a statute; it would thus be inappropriate to create an implied exception to the Reform Act for actions that do not satisfy this standard.

Finally, Congress was aware of the implications of making the FTCA remedy exclusive of any other action (save only those based on a violation of the Constitution or a federal statute) against any employee of the government. The House committee report specified that "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate." H.R. Rep. No. 700, *supra*, at 6. The examples cited included *Powers* v. *Schultz*, *supra*, a case indistinguishable from this one.[21] Congress thus clearly intended the result required by the express terms of the Reform Act: preclusion of an action against an individual employee by those in respondents' position.

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[21] Indeed, the citation of *Powers* v. *Schultz*, *supra*, suggests that the drafters thought military physicians already had the protection that the Reform Act was designed to afford to *all* federal employees. Whether or not that impression was correct, there is no doubt that Congress intended physicians to receive the same protection as other employees.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to substitute the United States as the sole defendant and to dismiss the action.

Respectfully submitted.

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STATUTORY APPENDIX

1. Sections 1346(b), 2761, and 2680 of Title 28 U.S.C., provide as follows:

§ 1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United

States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

§ 2680. Exceptions

The provisions of this chapter [28 U.S.C. 2671-2680] and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs

duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

2. Section 8 of the Federal Employees Liability Reform and Tort Compensation Act of 1988, 102 Stat. 4565-4566, provides as follows:

(a) **GENERAL RULE.**—This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act [Nov. 18, 1988].

(b) **APPLICABILITY TO PROCEEDINGS.**—The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

(c) **PENDING STATE PROCEEDINGS.**—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney

General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

(d) **CLAIMS ACCRUING BEFORE ENACTMENT.**—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

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